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NOTES

THE TAFT-HARTLEY ACT AND COERCIVE SPEECH

Introduction

The first major piece of labor legislation enacted in this country, the Wagner Act,[1] had for its purpose the protection of labor's right to organize and the encouragement of collective bargaining.[2] This Act contained no provision dealing with the right of free speech of either employer or employee, for it seemed, at the time, unnecessary to add to the Constitutional guaranty embodied in the First Amendment.[3] The inevitable clash of interests between labor and management, however, brought into focus the necessity for considering possible limitations on that guaranty in the field of labor relations. This task was undertaken by the National Labor Relations Board[4] in the first instance, and is reviewable by the federal courts.

Among the five unfair labor practices prohibited by the Wagner Act was any interference, restraint or coercion of employees in the exercise of their protected rights.[5] During the life of the original Act, employers had consistently voiced their dissatisfaction with the enforcement of this prohibition, claiming that their Constitutional right of free speech was being abridged.[6] Statutory protection was therefore advocated. Consequently, when the Act was amended in 1947 by the Taft-Hartley Act,[7] a specific subsection, Section 8(c), provided that the expression of any views, arguments or opinions shall not constitute or be evidence of unfair practice unless they contain a threat of reprisal or a promise of benefit.[8]

Almost six years have elapsed since the enactment of Section 8(c), the "free speech provision." Although there are a number of aspects to its operation, the present discussion will be confined to the method of distinguishing between coercive and non-coercive speech.

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[1] 49 STAT. 449 (1935), 29 U. S. C. §§ 151 *et seq.* (1946) (National Labor Relations Act).

[2] *Ibid.*; MILLIS-BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 3 (1950).

[3] U. S. CONST. AMEND. I.

[4] As provided in the Act: 49 STAT. 451 (1935), 29 U. S. C. § 153 (1946).

[5] 49 STAT. 452 (1935), 29 U. S. C. § 158(1) (1946).

[6] MILLIS-BROWN, *op. cit. supra* note 2, at 174.

[7] 61 STAT. 136 (1947), 29 U. S. C. §§ 141 *et seq.* (Supp. 1950) (Labor-Management Relations Act).

[8] 61 STAT. 142 (1947), 29 U. S. C. § 158(c) (Supp. 1950).

Coercive Speech Under the Wagner Act

It was conceded that, under the original Act, the employer had a right to express his views on unions and union matters so long as his expressions could not be said to interfere with the employees' rights to organize.[9] This was an idle admission, however, because in practice, the Board considered the economic power which an employer wields over his employees, and expressions which were no more than mere opinion or argument were adjudged coercive.[10] These decisions were upheld by the courts.[11] In *NLRB v. Federbush,*[12] Judge Learned Hand stated that, while an employer is generally as free as anyone else to voice his feelings against trade-unions, his freedom will be restricted when his audience is composed of persons dependent upon him for their livelihood. In such a situation, it was said, his statements may have a more sinister effect than they would have if spoken to non-employees.[13]

Under this early test an employer's speech was considered from two aspects: first, as a mere expression of conviction which would be protected by the First Amendment, and second, as a statement of his views which employees may think it detrimental to disregard.[14] If the latter aspect predominated to an extent deemed coercive, which it could be said to do in almost every case, the Board would enjoin such communications.[15]

In 1941 the Supreme Court, in *NLRB v. Virginia Electric & Power Company,*[16] established more liberal principles. The Court, reversing the Board's finding of unfair practice based solely upon speeches not in themselves coercive, recognized that these speeches

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[9] See Continental Box Co. v. NLRB, 113 F. 2d 93 (5th Cir. 1940).

[10] Lightner Publishing Co., 12 N. L. R. B. 1255 (1939); Tennessee Copper Co., 9 N. L. R. B. 117 (1938); Hoover Co., 6 N. L. R. B. 688 (1938). In the latter case a letter from management to employees was held to constitute interference wherein the strongest language was as follows:

> It seems in order to suggest that labor organizers are prompted in their efforts by the fees they collect from those who join the organizations they are promoting.
>
> It is well to remember that long drawn out strikes are usually settled on a basis whereby more has been lost by factory employees than is gained through increased pay schemes or improved working conditions. *Id.* at 691.

[11] See NLRB v. Link-Belt Co., 311 U. S. 584 (1941); International Association of Machinists v. NLRB, 311 U. S. 72 (1940). "Slight suggestions as to the employer's choice between unions may have a telling effect among men who know the consequences of incurring that employer's strong displeasure." *Id.* at 78.

[12] 121 F. 2d 954 (2d Cir. 1941).

[13] "What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart." *Id.* at 957.

[14] See Cox, CASES ON LABOR LAW 401 (2d ed. 1951).

[15] See note 10 *supra.*

[16] 314 U. S. 469 (1941).

would constitute unfair practice *only* if considered in the light of the totality of the company's activities, anti-union background and other acts of interference.[17] Upon remand of the case, the Board considered the same speeches in conjunction with the facts suggested by the Supreme Court, and again enjoined them. This same finding was then upheld on appeal upon different grounds.[18] An employer's right to express his opinions was thus given some effect, while the principle was established that speech, not in itself coercive, may become such when considered in the light of other influencing factors.

This test, referred to as the "totality of conduct" doctrine, was employed in *NLRB v. American Tube Bending Company.*[19] It was there held that utterances not by themselves of a threatening nature, were not violative of the Act where no other influencing facts appeared in the record. Subsequent cases before the Board and the courts were decided with this test as a guide.[20] The inherent difficulty with its application, however, was that so much depended upon the particular fact situations presented, and consequently, reliance upon precedent was limited to analogy. By 1947, due perhaps to the growing strength of labor organizations, there was an apparent tendency for the Board to require stronger evidence of collateral facts than had theretofore been necessary in order to attribute the element of coercion to employers' statements.[21]

Under the Wagner Act there developed a closely related test for determining the existence of coercion: the "compulsory" or "captive" audience doctrine as formulated in *NLRB v. Clark Brothers Company.*[22] Speeches not in themselves coercive, but made on company time, on company property, and to which the employees were required to listen, were found to be an unfair labor practice. This conclusion was attained by examining the setting in which those speeches were given.

Many vociferous employers, however, protested against an application of these tests on the ground that they were being effectively deprived of their constitutional rights. Whether or not the criticism levelled by employers against the tests applied under the Wagner

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[17] ". . . [I]n determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." *Id.* at 477.

[18] Virginia Elec. & Power Co. v. NLRB, 319 U. S. 533 (1943).

[19] 134 F. 2d 993 (2d Cir.), *cert. denied,* 320 U. S. 768 (1943).

[20] See Donnelley & Sons Co. v. NLRB, 156 F. 2d 416 (7th Cir. 1946), *cert. denied,* 329 U. S. 810 (1947); NLRB v. Lettie Lee, Inc., 140 F. 2d 243 (9th Cir. 1944); NLRB v. Reynolds Wire Co., 121 F. 2d 627 (7th Cir. 1941); Van Raalte, Inc., 69 N. L. R. B. 1326 (1946); Agar Packing & Provision Corp., 58 N. L. R. B. 738 (1944).

[21] See Hercules Motors Corp., 73 N. L. R. B. 650 (1947); Fisher Governor Co., 71 N. L. R. B. 1291 (1946).

[22] 163 F. 2d 373 (2d Cir. 1947). *Contra:* NLRB v. Montgomery Ward & Co., 157 F. 2d 486 (8th Cir. 1946).

Act had a sound basis in fact, it was in order to correct any inequity that the present law was enacted.[23] Although the new section may be applicable to both employer and employee, one of its primary purposes was ". . . to protect the right of free speech when what the *employer* says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination."[24] That the threat necessary to take a statement outside the protection of the section need not be an express threat is illustrated by the legislative history. It was provided in the House Bill that a statement was not to constitute or be evidence of an unfair practice unless, by its own *express* terms, it threatened reprisal.[25] The section as finally enacted, however, omitted that requirement. As a result, the section also prohibits *implied* threats or promises, but just what may be considered as giving rise to such implication is a question of construction.

Judicial Construction of Section 8(c)

The first definite change wrought by the new provision was the immediate rejection by the Board of the "captive audience" test in determining whether an employer's speech is coercive.[26] It is still considered an unfair labor practice, however, for an employer to deny to a union the opportunity of answering any adverse charges contained in a speech given on company time, where the union has no other reasonable forum in which to present its case.[27] The proscribed unfairness lies, not in the employer's speech, but in the company's refusal to permit solicitation by the union.[28] But the employer need not provide the union with a rebuttal period every time he makes a speech, so long as the "avenues of communication" are kept open.[29] In substance, the employer may lawfully make such speeches provided he does not have a discriminatory "no-solicitation" rule.[30]

With regard to the "totality of conduct" doctrine, the present picture is somewhat less clear. Shortly after Section 8(c) was enacted, the National Labor Relations Board expressed the view that the provision substantially increased the protection previously granted

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[23] SEN. REP. No. 105, 80th Cong., 1st Sess. 23 (1947).

[24] H. R. REP. No. 510, 80th Cong., 1st Sess. 45 (1947) (emphasis added).

[25] H. R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947).

[26] Babcock & Wilcox Co., 77 N. L. R. B. 577 (1948). ". . . [T]he language of section 8(c) . . . and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices . . . ." *Id.* at 578. *See* Hinde & Dauch Paper Co., 78 N. L. R. B. 488, 489 (1948).

[27] See Belknap Hardware & Mfg. Co., 98 N. L. R. B. 11, 13 (1952); Bernardin Bottle Cap Co., 97 N. L. R. B. 1559 (1952); *see* Bonwit Teller, Inc. v. NLRB, 197 F. 2d 640, 645 (2d Cir. 1952) (appeal pending before Supreme Court).

[28] *Ibid.*

[29] *See* Bonwit Teller, Inc. v. NLRB, *supra* note 27, at 646.

[30] *Ibid.*

employers under the original Act,[31] and a number of its decisions during that period apparently sustain this opinion.[32] This was due to a literal construction of the new statute, limiting the Board to a consideration of the words of the speech uninfluenced by outside factors. At the same time, however, the "totality" doctrine was applied in other cases much as it was before the 1947 amendment.[33] When the issue reached the courts of appeal, the tendency was to uphold these latter decisions by giving Section 8(c) a liberal interpretation, some courts going so far as to consider it merely a restatement of the principles embodied in the Constitution.[34] It is difficult to determine in all cases, however, whether or not the "totality" doctrine has been adopted in its entirety.

In *NLRB v. Fulton Bag & Cotton Mills,*[35] the defendant-company pleaded the protection afforded in Section 8(c) as a defense in an action based on certain statements made to, and questions asked of, its employees. The court asserted that when these utterances are considered in connection with the circumstances in which they were made, the Board's finding of an unfair practice was adequately supported. Again, in *NLRB v. Kropp Forge Company,*[36] the Board had issued a cease and desist order against the company based, in part, upon statements of the company's representatives which were merely expressive of an anti-union sentiment.[37] Although Section 8(c) was pleaded in defense, the order was affirmed on appeal, the court holding that whether or not the words of an employer constitute an unfair practice depends upon the respective positions of the parties, their backgrounds and general conduct. Thus, the statute has not impaired the power of the Board to enjoin statements which form part of a *coercive pattern.* The *LaSalle Steel*[38] case, in which a similar conclusion had been reached a short time before, was cited with approval in the *Kropp Forge* case.

These cases established a standard for interpreting the new provision, which standard has been applied in subsequent decisions of the Board and the courts.[39] In a recent case it was asserted, by way

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[31] 13 NLRB ANN. REP. 49 (1948).

[32] See Burns Brick Co., 80 N. L. R. B. 389 (1948); Babcock & Wilcox Co., 77 N. L. R. B. 577 (1948); Tygart Sportswear Co., 77 N. L. R. B. 613 (1948).

[33] See Red Rock Co., 84 N. L. R. B. 521 (1949); *see* Abercrombie Co., 83 N. L. R. B. 524, 530 (1949). *But cf.* Minnesota Mining & Mfg. Co., 81 N. L. R. B. 557, 559 (1949).

[34] *See* NLRB v. Bailey Co., 180 F. 2d 278, 280 (6th Cir. 1950); NLRB v. La Salle Steel Co., 178 F. 2d 829, 835 (7th Cir. 1949), *cert. denied,* 339 U. S. 963 (1950).

[35] 175 F. 2d 675 (5th Cir. 1949).

[36] 178 F. 2d 822 (7th Cir. 1949), *cert. denied,* 340 U. S. 810 (1950).

[37] The specific statements were, for example, "Listen, Bill, I don't want no organization in here"; and, "We don't want the A. F. of L. in here. They won't do us any good." *Id.* at 824-25.

[38] 178 F. 2d 829 (7th Cir. 1949), *cert. denied,* 339 U. S. 963 (1951).

[39] See NLRB v. Nabors, 196 F. 2d 272 (5th Cir. 1952), *cert. denied,* 73

of dicta, that employers are required to maintain an attitude of strict neutrality.[40] This type thinking constitutes a throw-back to the earlier cases decided under the original Wagner Act.[41] Other decisions, though not using these terms, have nevertheless considered the employer's background and the surrounding circumstances in determining the coercive nature of his speeches.[42] This does not necessarily mean, however, that the employer's speech will be rendered coercive merely because he has shown some anti-union tendencies in the past. It is in each case a question of degree, but a great deal of weight still seems to rest upon the presence or absence of outside factors, rather than upon the literal phraseology of the statute.

Thus, in *NLRB v. Sidran*,[43] speech which contained no threat or promise was properly held not to be such as would reasonably tend to intimidate.[44] The reason appeared to be, however, not merely the fact that it lacked the prohibited elements, but also because from the *entire record* it could not be deemed coercive. The court cited the *Virginia Electric & Power Company* case, among others which were decided upon the principles there employed in construing the Wagner Act.[45] Similarly, in *NLRB v. Bradley Washfountain Company*,[46] it was held that certain communications to striking employees were insufficient to constitute unfair practice. Again the basis for the decision was not the lack of coercion in the words themselves, but primarily the fact that the strike was an economic one, not caused by any act of the employer.[47]

Although the "totality of conduct" doctrine continues to be applied in substance, the courts rarely refer directly to it as such. In support of their conclusions, they do, however, cite those cases in which it was employed prior to the amendment. It appears therefore, that Section 8(c) has made little, if any, change in the manner theretofore employed in distinguishing between coercive and non-coercive

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Sup. Ct. 106 (1952); NLRB v. Mayer, 196 F. 2d 286 (5th Cir. 1952); Happ Bros. Co., 90 N. L. R. B. 1513 (1950).

[40] *See* Harrison Sheet Steel Co. v. NLRB, 194 F. 2d 407, 410 (7th Cir. 1952).

[41] See note 10 *supra*.

[42] See note 39 *supra*.

[43] 181 F. 2d 671 (5th Cir. 1950).

[44] That the statements need not actually have intimidated the employees is illustrated by NLRB v. Valley Broadcasting Co., 189 F. 2d 582 (6th Cir. 1951); Red Rock Co., 84 N. L. R. B. 521 (1949); Chicopee Mfg. Corp., 85 N. L. R. B. 1439 (1949).

[45] The other cases cited were: Big Lake Oil Co. v. NLRB, 146 F. 2d 967 (5th Cir. 1945); NLRB v. American Tube Bending Co., 134 F. 2d 993 (2d Cir.), *cert. denied*, 320 U. S. 768 (1943).

[46] 192 F. 2d 144 (7th Cir. 1951).

[47] In the course of the opinion, Judge Lindley makes an excellent classification of the various situations arising between employer and employee and the corresponding need for restriction on the employer's statements in each instance. *Id.* at 152-53.

speech. The statute, in this respect, has been so construed as to render it almost nugatory. Just what factors will influence the decision in any particular case depends, of course, upon the peculiar facts involved; but an accurate prediction has become even more difficult than in the ordinary situations because of the general and seemingly evasive language in some of the opinions.[48] In any event, the outcome does not depend upon an application of Section 8(c). Aside from its effect upon the "compulsory audience" doctrine, that provision has served chiefly to confuse.

Conclusion

Words, by their very nature, derive their import from the environment in which they are uttered. Those, which at one time and in one set of circumstances convey a certain meaning, may, at other times have quite different, even entirely opposite connotations. Much depends upon the speaker, his relation to his audience, and innumerable, sometimes intangible, but none the less potent emotional and psychological factors. A group of people can all listen to the same speech or read the same book, and when finished, should one ask each to explain its meaning, there would often be as many explanations as there are people. In any attempt to ascertain the effect of certain words upon a particular person or group of persons, therefore, to look at the words alone, as in a vacuum, is but to begin the investigation.

With these elementary and well recognized principles [49] in mind, it seems a surprisingly naive attitude to suppose that they need not apply in the field of labor relations. Of all areas, that is one in which they most definitely should apply. Yet, Section 8(c) of the Taft-Hartley Act is so worded that it would, if interpreted literally, exclude from consideration all but the unadorned words of the speaker or writer. True, the words need not contain an express threat or promise in order to constitute unfair practice,[50] but if they are to be held coercive they must *contain,* at least impliedly, those prohibited ele-

[48] See NLRB v. Valley Broadcasting Co., *supra* note 44, wherein words were held to be unfair because they were ". . . in their general tenor, coercive and alluring in their nature." *Id.* at 586.

[49] Judge Learned Hand expressed these principles in a highly artistic manner, as follows: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part." NLRB v. Federbush Co., 121 F. 2d 954, 957 (2d Cir. 1941). In determining the relation between speaker and hearer, however, it is not enough merely to discover that it is one of employer and employee. One should go further before attributing to language a coercive character.

[50] See note 25 *supra.*

ments. Certainly the statute cannot mean that the implication is to be derived from outside circumstances and conditions, for that would in no way have altered the method employed before the statute was passed. It is submitted that the confusion present in the cases since 1947 is the result of a conflict created by the statute as it was finally enacted. This conflict arose because a literal interpretation of the section would have been in direct contradiction to the inherent nature of the spoken or written word, and a liberal interpretation would have nullified the provision. The courts, in an attempt to reconcile these two extremes, and still arrive at a just determination on each occasion, resorted to language which was, in essence, declaratory of prior law but which, because of an awareness of the statute, was couched in confusing and misleading terms. It is further submitted that the practical solution lies in legislatively eliminating the present problem from the provision. A re-drafting may be necessary in order to retain advances made under it in other directions,[51] but no attempt should be made to set an arbitrary standard for ascertaining the effect of words. This is an area for the exercise of administrative and judicial discretion, and more reliance should be placed upon the courts to balance the conflicting interests and to obtain substantial justice according to the demands of each dispute.

A Proposal for Comparative Negligence in New York

Introduction

In essence, negligence is the doing of an act without care, or the failure to perform an act, the performance of which is dictated by care. The degree of care to be exercised in a given factual situation is commensurate with the danger to be avoided.[1] Negligence is actionable only where an injured plaintiff shows: that a duty was owing by the defendant to him to exercise care; [2] an act or omission whereby defendant violated that existing duty; [3] that the defendant's negli-

[51] An example is the principle that an anti-union speech by the employer may not be used as a motivating factor for subsequent alleged anti-union activity on the part of the employer, if such speech is non-coercive in character. Pittsburgh S.S. Co. v. NLRB, 180 F. 2d 731 (6th Cir. 1950), *aff'd*, 340 U. S. 498 (1951).

[1] Barbato v. Vollmer, 273 App. Div. 169, 76 N. Y. S. 2d 528 (3d Dep't 1948).

[2] Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).

[3] Johnson v. City of New York, 208 N. Y. 77, 101 N. E. 691 (1913).